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No. 04-367

In the Supreme Court of the United States

EARL DEWAAL, PETITIONER

v.

JOSEPH F. ALSTON, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

TODD KIM
DAVID C. SHILTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether petitioner has standing to challenge a National Park Service policy of requesting that visitors voluntarily refrain from walking around or under a natural rock structure due to its religious and cultural significance to Native Americans.

2. Whether a National Park Service policy of requesting that visitors voluntarily refrain from walking around or under a natural rock structure due to its religious and cultural significance to Native Americans violates the Establishment Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter, but is *reprinted in* 98 Fed. Appx. 711. The opinion of the district court (Pet. App. 13-50) is reported at 209 F. Supp. 2d 1207.

JURISDICTION

The court of appeals entered its judgment on March 23, 2004. A petition for rehearing was denied on June 15, 2004 (Pet. App. 53-54). The petition for a writ of certiorari was filed on September 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Located in Southern Utah, Rainbow Bridge is the largest, naturally formed bridge in the world. Pet. App. 14. In 1910, President William Taft declared the Rainbow Bridge rock formation to be a national monument. *Id.* at 17. Rainbow Bridge, which is largely surrounded by the Navajo Reservation, has religious and cultural significance for a variety of Indian Tribes, including the Navajo, Hopi, San Juan Paiute, and Pueblo Tribes. *Id.* at 16-17, 19.

Prior to the federal government's completion of the nearby Glen Canyon Dam and the Glen Canyon Recreation Area, access to Rainbow Bridge was difficult, and visitor numbers were low. Pet. App. 19. But the creation of Lake Powell behind Glen Canyon Dam provided easy boat access to the Monument, causing the number of visitors to skyrocket from around 1000 in 1955 to 346,000 in 1995. *Ibid.* That dramatic increase created a variety of problems for the Monument, including erosion, damage to natural vegetation, rock graffiti, litter, noise pollution, and vandalism. *Id.* at 21.

Over the course of nearly ten years, the National Park Service met with interested groups and devised a management plan for the Rainbow Bridge site. Pet. App. 21, 23. The Park Service published the final General Management Plan (Plan) in June 1993. *Id.* at 23-24. To protect the physical integrity of Rainbow Bridge and the surrounding area, the Plan contemplates the funneling of visitors onto hardened trails and viewing areas having low resource impacts, and the closure of eroded areas to traffic so that native species can be reestablished. *Id.* at 24. The Plan also acknowledges the concerns of neighboring Indian Tribes

and contemplates a program by which visitors are made aware that members of those Tribes view the Bridge as a sacred site. *Ibid.* The purpose of that notice is both to "help visitors understand that different cultures perceive resources differently, i.e., some neighboring American Indians regard Rainbow Bridge as sacred," and to "generate visitor interest in the cultures and lifestyles, from prehistoric to present times, of the people of the Rainbow Bridge region." *Id.* at 25. Under the Plan, small wayside signs and a brochure note the Bridge's significance to Native Americans and request that visitors respect longstanding Native American beliefs by voluntarily refraining from approaching or walking under Rainbow Bridge. *Id.* at 5, 25. However, nothing in the Plan prohibits visitors from approaching or walking underneath Rainbow Bridge. In fact, many visitors continue to approach and walk under the Bridge. *Id.* at 8.[1]

2. Petitioner filed suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, against the Superintendent of Rainbow National Monument, the Director of the National Park Service, and the National Park Service seeking declaratory and injunctive relief halting implementation of the Plan "as it relates to the Park Service's policy to request that the public respect cultural differences by voluntarily not walking underneath Rainbow Bridge." Pet. App. 25.[2] The complaint alleges

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[1] Contrary to petitioner's formulation of the questions presented, see Pet. i, nothing in the Plan "requires all visitors to [the] national monument to be instructed that an area of the monument is a 'sacred religious site' to some American Indians and that all visitors must show 'respect' for that religion."

[2] A number of other individuals and an organization also filed suit, but their cases were dismissed below, see Pet. App. 4, 27-35, and none

that the policy of requesting that visitors refrain from walking under the Bridge violates the Establishment Clause of the First Amendment of the Constitution. In the complaint, petitioner alleges that he visited the Monument and felt compelled not to walk under the Bridge because of signs and a statement by a Park Ranger asking him voluntarily to refrain from walking underneath Rainbow Bridge. *Id.* at 7, 32-33.[3]

The district court dismissed the complaint. Pet. App. 13-50. The court first held that petitioner had standing to pursue his Establishment Clause claim based on "the Park Service's request for voluntary compliance in not approaching or walking underneath Rainbow Bridge." *Id.* at 34. On the merits, the district court ruled that the Plan and the Park Service's implementation of the Plan did not violate the Establishment Clause. The court found that "promoting an understanding of neighboring cultures is an appropriate secular purpose," and that "[t]he purpose is primarily informational" and would not be viewed by a reasonable observer as endorsing Indian religion. *Id.* at 44-45. The court stressed that the Park

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of them joins in the petition for a writ of certiorari or seeks this Court's review of the dismissal of their claims.

[3] The complaint refers to an incident in 1999 when Park Rangers allegedly told petitioner that he would be cited if he walked beneath Rainbow Bridge. See Pet. 5. The district court dismissed that claim from this Administrative Procedure Act lawsuit because it pertained to the conduct of individual Park Rangers who were not named as defendants. The district court held that any claim arising out of the 1999 incident would have to proceed under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 32. Petitioner did not challenge that ruling by the district court on appeal, nor did he raise that issue in his petition to this Court. The district court found standing based on a separate visit in 1998 that was discussed during discovery in the case. See *id.* at 7.

Service policy "only asks visitors to consider not walking to or under Rainbow Bridge; it does not, as plaintiff suggests, coerce visitors into practicing the Native American religion associated with the belief about not walking under the Rainbow God." *Id.* at 46.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1-12. The court ruled that petitioner lacked standing, and thus did not address the merits of the complaint. The court held that the mere request that petitioner voluntarily refrain from approaching or walking underneath the Bridge invaded no legally protected interest of petitioner's and inflicted no injury because he remained free at all times to walk under Rainbow Bridge. *Id.* at 10-12 (citing *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000)).

ARGUMENT

1. The court of appeals' unpublished decision holding that petitioner lacks standing does not merit this Court's review. This Court held in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that the "irreducible constitutional minimum of standing" requires that the plaintiff (1) "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision." *Id.* at 560-561 (internal quotation marks and citation omitted). Absent the concrete invasion of a legally protected interest, federal courts cannot vindicate "the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973). Instead, plaintiffs must make "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566.

The decision below reflects a straightforward application of the test for standing established in *Lujan*. The court of appeals applied the correct legal standard to the record in this case and concluded that a simple governmental request to refrain from certain activity while a visitor on property owned and managed by the federal government—a request that petitioner was free to disregard without sanction, and that numerous visitors did disregard without consequence, Pet. App. 8—does not constitute the invasion of any legally protected interest. See *id.* at 10-12; see also *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814, 821-822 (10th Cir. 1999) (applying *Lujan* to similar policy requesting that visitors refrain from rock climbing at Devil's Tower during the month of June out of respect for Native American religious beliefs), cert. denied, 529 U.S. 1037 (2000). Petitioner's record-bound disagreement with the application of settled law to the facts of his case does not merit further review by this Court.

Petitioner's contention (Pet. 6-13) that the court of appeals' decision conflicts with the rulings of other courts is incorrect. First, almost all of the court of appeals' standing cases cited by petitioner (see Pet. 6-7) predate this Court's decision clarifying the standard for Article III standing in *Lujan*.

Second, the decision below, in fact, does not conflict with the decision of any other court of appeals. All of

the court of appeals cases cited by petitioner involved governmental displays of sectarian religious symbols on government property. See *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) (cross posted on federal land); *Suhre* v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997) (courtroom display of the Ten Commandments); *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (inclusion of image of Mormon temple in city logo), cert. denied, 495 U.S. 910 (1990); *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (city seal containing the word "Christianity"); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (chapel in airport), cert. denied, 475 U.S. 1047 (1986); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (large lighted cross in state park); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.) (courthouse display of the Ten Commandments), cert. denied, 414 U.S. 879 (1973); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (creche in federal park).

This case does not involve the display of any religious item or symbol on government property. Rainbow Bridge is not a governmental display of a religious symbol on property; it is property in its natural state. Rainbow Bridge is a natural rock formation of undeniable secular interest and value. Petitioner does not challenge the constitutionality of the government's designation of Rainbow Bridge as a national monument or the government's decision to open the Rainbow Bridge Monument to public viewing. Nor does petitioner claim that he has been exposed to any Native American religious practices at Rainbow Bridge. Indeed, the gist of petitioner's complaint is that he desires closer contact with Rainbow Bridge; not that the government has erected a display or exposed him to

religious symbols or rituals that he wishes to avoid. Compare *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1201-1203 (1996) (Rehnquist, C.J., & Scalia & Thomas, JJ., dissenting from the denial of certiorari) (discussing conflict in the circuits on Article III standing to challenge "expos[ure] to a state symbol that offends his beliefs"). This case thus provides no opportunity for the Court to address the question of Article III standing to challenge sectarian displays on government property.[4]

The issue presented in this case is distinct and much narrower—whether hearing or reading a governmental request to conduct oneself, while a visitor on federal property, in a manner that is respectful of the religious and cultural beliefs of Indian Tribes for which the federal government has a unique trust responsibility, see *Morton* v. *Mancari*, 417 U.S. 535 (1974)—invades a cognizable, legally protected interest. Not one of the decisions from the other courts of appeals cited by petitioner presented, raised, or decided that question. There thus is no conflict in the circuits warranting this

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[4] In addition, most of the cases petitioner cites, unlike the case at hand, involved religious displays in the plaintiff's home community.

> The circuits have thus recognized that "[t]he practices of our own community may create a larger psychological wound than someplace we are just passing through." *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994). Plaintiffs who "are part of the [community where challenged religious symbolism is located] and are directly affronted by the presence of [this symbolism]" certainly "have more than an abstract interest in seeing that [the government] observes the Constitution." *Saladin*, 812 F.2d at 693. Thus, where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie.

Suhre, 131 F.3d at 1087.

Court's review. Indeed, the petition mirrors the arguments advanced in the petition for a writ of certiorari in *Bear Lodge*, *supra*, in which this Court denied review. See 529 U.S. 1037 (2000).

The court of appeals' decision, moreover, is correct. Petitioner's offense at the government's non-obligatory request is not sufficient to establish standing. The "psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under [Article] III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982). No legally protected interest of petitioner's was impaired. He remained free at all times to view, visit, approach, and walk under Rainbow Bridge. Petitioner was neither "subjected to unwelcome religious exercises" at Rainbow Bridge, nor was he "forced to assume special burdens to avoid them." *Id.* at 486 n.22. While petitioner ultimately did not approach Rainbow Bridge, that was a consequence of his own intervening, "genuine and independent private choice," after being provided with information concerning the religious and cultural views of others. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002). The alleged injury thus arose "as a consequence" of petitioner's own decisionmaking. *Valley Forge*, 454 U.S. at 485 (emphasis omitted).

2. Petitioner's Establishment Clause challenge (Pet. 13-22) to the governmental policy of requesting that visitors refrain from approaching Rainbow Bridge does not merit this Court's review. The court of appeals did not address the Establishment Clause question, so it is not properly positioned for this Court's review.

Furthermore, no other court of appeals has addressed whether such voluntary requests of visitors to federal land violate the Establishment Clause. There thus is no conflict in the circuits that necessitates this Court's review at this time.

In fact, the policy fully comports with this Court's precedent. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court upheld against an Establishment Clause challenge a program of releasing students early from public elementary school classes so that they could attend independently sponsored religion classes. In so holding, the Court explained that government "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. The Establishment Clause does not require government to operate its programs with "callous indifference to religious groups," for "[t]hat would be preferring those who believe in no religion over those who do believe." *Ibid.* Moreover, the government's longstanding trust responsibility for Indian Tribes makes this type of measured and calibrated accommodation of the religious needs of sovereign Tribes on land that historically belonged to them particularly appropriate. See *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) ("The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."); see generally *Morton* v. *Mancari*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

TODD KIM
DAVID C. SHILTON
Attorneys

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